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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION COMPANY, INCORPORATED, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Of Counsel.

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OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION CO., INC., A CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is a cross-petition for writ of certiorari, filed in connection with the petititon of the Government, in "The United States, petitioner v. Binghamton Construction Co., Inc.", No. 794, filed this term to review the decision of the said Court in the above entitled cause, granting judgment to petitioner (hereinafter referred to as Plaintiff), for only a portion of its claim against The United States (hereinafter referred to as Defendant).

Opinion Below

The opinion of the Court of Claims of The United States was rendered on October 7, 1952, and is reported at 107 Fed. Supp. 712.

In Plaintiff's suit for Defendant's breach of the "Unit Price Contract" between said parties, for the construction of a flood Protection Project in the City of Elmira, New York, the Court of Claims awarded Plaintiff $7,363.22 of the damages of $15,597.38, claimed by reason of contract misrepresentations,—and denied in toto, both Plaintiff's claim to a balance of $14,785.55, due and payable for "Sheeting (including Shoring)" performed under Contract Item #7, and also, its claim for $6,934.26 for the additional cost of "Treating (the surfaces of) New Concrete Work" as directed by new and unanticipated specifications, issued nearly six months after the contract work commenced.

The Court of Claims denied Plaintiff's motion to amend said judgment to award Plaintiff additional sums aggregating $28,208.56,—or in the alternative, for a new trial; and also denied Plaintiff's renewal of said motion.

Jurisdiction

The order denying Plaintiff's said motion was made and entered on January 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

Questions Presented

1. Whether the subject Contract was void *ab initio,* for Defendant's failure to comply with the mandatory provisions of the Davis-Bacon Act (49 Stat. 1011, 40 U.S.C., Secs. 276a, 276a-1), in that the rates specified in the Contract Schedule of Minimum Wages, were predicated upon an alleged field investigation and report to the Secretary of Labor, *by the War Department's District Engineer,* of wage rates prevailing in the Contract area,—rather than upon an investigation by the Labor Department itself, made in the manner prescribed by said Department's Regulation #503.

2. Whether, *having ruled* that errors in the "Minimum

Wage Schedule" issued by the Secretary of Labor on January 31, 1941 for incorporation in the subject Contract, constituted a positive contract misrepresentation "from the consequences of which the Defendant cannot be relieved"—*the Court of Claims erred* in refusing to measure Plaintiff's damages by the difference between said erroneous rates and *the increased wage rates that became effective on April 1, 1941 and admittedly were prevailing on June 3, 1941, when Defendant approved the Contract and work commenced thereon,* but instead, limited Plaintiff's recovery to the difference between said erroneous Contract rates and the wage rates prevailing in the Contract area, prior to the aforesaid increase of April 1, 1941, as set forth in a "Minimum Wage Schedule" issued by the Secretary of Labor on *March 4, 1941* for incorporation in another contract,—particularly since said "Minimum Wage Schedule" of March 4, 1941, contained the recital that the rates therein set forth were to be considered as prevailing in the Contract area for a maximum period of 90 days, and therefore, inviting bids on March 29th, in accepting Plaintiff's bid on May 14th, and in approving the subject Contract on June 3rd, 1941, Defendant knew, or should have known, that said Wage Determination would not be effective after June 2, 1941.

3. Whether, *having found* that for "Sheeting and Shoring" installed in trench excavations, to furnish the "lateral support" necessary to prevent the shifting of the ground beneath six (6) adjacent structures, Plaintiff was to be paid $.65 *for each square foot of area protected* by said "Sheeting"; and *having ruled* that the decision of Defendant's Contracting Officer as to what constituted the areas so protected, *was* not final and binding, under the rules expounded in *Wunderlich* v. *United States,* 342 U. S. 98,—*the Court of Claims erred* in approving Defendant's use of a formula for computing the "protected areas" for which Plaintiff was

paid, that omitted from said "protected areas", all "Sheeting and Shoring" installed in said trenches at levels lower than the bottom levels of said adjacent structures,—despite the fact that the furnishing of "lateral support" to the ground upon which said structures rested, only became necessary when Plaintiff's excavating operations reached and passed the ground level supporting each adjacent structure.

4. Whether *the Court of Claims erred* in rejecting Plaintiff's claim that it was underpaid for "Sheeting and Shoring" installed under Contract Item #7, in view of the fact that the evidence discloses that,—(1) that the parties were in agreement as to the Contract locations at which Sheeting and Shoring was installed, and (2) that Plaintiff was to be paid $.65 for each square foot of area protected thereby, and (3) that Plaintiff had fully disclosed the dimensions of length and heighth used in computing the "payment areas" claimed by it at each such location, and (4) that Defendant's Contracting Officer had failed and refused to reveal either during the progress of the work, or since the completion of the Contract, or at the trial of the action, the dimensions of length and heighth used in computing the reduced "payment areas" allowed and paid for at said Contract locations,—despite the implied obligation of the Contracting Officer for every "Unit Price" contract, to fully and frankly disclose to the contractor, the quantities allowed by him with respect to each Contract item.

5. *Whether the Court of Claims erred* in denying Plaintiff's claim for $6,070.19 for the added cost of complying with new and changed specifications issued on October 29, 1941, with respect to treatment of the exposed surfaces of new concrete structures to be erected in 1942, upon the ground that said new specifications were no more than the detailed instructions that Plaintiff should have anticipated

receiving to supplement the very general directions contained in the original specifications,—where (1) Article 3 of the subject Contract and paragraph 1-19 of the Specifications, direct that any changes made in the method of execution of the work, as called for by the original Specifications, resulting in additional cost to the contractor, entitle the contractor to receive additional compensation; and (2) both Plaintiff's experts and Defendant's Contracting Officer testified that the original Contract Specifications were sufficiently detailed, so that adherence to same would produce a satisfactory finish to the surfaces of all exposed concrete; and (3) said new specifications issued after the Contract had been in progress for five months, materially changed the method of treatment of said concrete surfaces, from that called for by the original Specifications, and provided for the use of three (3) materials not required by the original specifications.

6. *Whether the Court of Claims erred* in denying Plaintiff's right to recover as damages for Contract misrepresentations, the difference between the common labor wage rate of $.55 per hour, found to be prevailing in the Contract area by the Secretary of Labor's Wage Determination of March 4, 1941, and the wage rate of $.625 per hour prevailing for common labor, on and after April 1, 1941, upon the ground that Plaintiff failed to establish by adequate proof, that the Defendant had notice of said rate increase prior to issuance of invitations to bid on the subject Contract on March 29, 1941,—in view of the fact that when Plaintiff moved in said Court for the production by the Secretary of Labor, of proof establishing that he had knowledge of said rate increase many months prior to April 1, 1941, and the Defendant opposed said motion, upon the ground that Plaintiff was seeking to attack in a collateral proceeding, a final wage rate determination by the Secretary of Labor, in violation

of the rule expounded by this Honorable Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, the Court of Claims denied Plaintiff's said Motion for Call, thereby itself barring the production of the very evidence that, in its decision, it held to be necessary to the proof of Plaintiff's claim.

Statute Involved

Act of August 30, 1935, 49 Stat. 1011 (U. S. Code, Title 40, Secs. 276a & 276a-1) commonly known as the Davis-Bacon Act, the pertinent portions of which direct that the advertised specifications for every Federal contract for public improvement costing in excess of $2,000.00, upon which mechanics and/or laborers are employed,—

> "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics, which shall be based upon the wages that *will be determined by the Secretary of Labor, to be prevailing* for the corresponding classes of laborers and mechanics employed in projects of a character similar to the contract work, in the—civil subdivision of the State—in which the work is to be performed." (Emphasis added)

Departmental Regulation Involved

Labor Department Regulation 503 relates to the manner of compliance of the Labor Department of the Davis-Bacon Act, and may be briefly summarized as follows—

> SECTION 1—that all requests by Contracting Officers be referred to the Solicitor of Labor, who shall obtain the evidence for the Secretary's predetermination.
>
> SECTION 2—sets forth the rules for determining what wage rates are prevailing in any given area.
>
> SECTION 3—defines the preliminary information to be collected by the Solicitor from the department files.
>
> SECTION 4—provides, that if data on file is insufficient, the Solicitor shall appoint a referee to conduct a field investigation and report.

SECTION 5a—Lists as those who may be appointed referee, Labor Department employees, and also qualified persons not employed by the Labor Department, who are approved by the Secretary, but does not include in those eligible, any employee of the War Department.

SECTIONS 6 to 20 incl.—define the duties of the referee, the scope of the inquiry, the sources of information to be investigated, the holding of a public hearing, and the procedure with respect thereto, and instructions for the preparation of the referee's report.

SECTION 21—provides that this regulation supersedes all prior instructions.

SECTION 22—(not applicable to this case—did not become effective until 2/3/42).

Said Regulation 503 was prescribed by the Secretary of Labor, following the amendment on August 30, 1935, of the Davis-Bacon Act (Public Law No. 403, 74th Congress); became effective on September 30, 1935; and was in full force and effect in 1940 and 1941, when the subject contract was advertised and let.

Statement

The within suit arises out of a contract awarded to and executed by Petitioner on May 14, 1941, and approved and accepted by the Respondent on June 3, 1941, for the construction of a Flood Protection Project along the Chemung River within the City of Elmira, New York.

Plaintiff was awarded said Contract upon a bid based upon unit prices applied to the various operations involved in the performance of the work, aggregating the estimated sum of $232,669.30.

Work commenced on June 3, 1941 and the Contract was completed and accepted in December, 1942.

Promptly after commencement of work, Plaintiff protested a misrepresentation in the Contract, in that the Min-

imum Wage Schedule incorporated in the Contract specifications, that presumably represented the prevailing scale of wage rates in Elmira, was in error in two material respects, in that although the wage rate for Carpenters was shown to be $1.00 per hour and for Common Laborers, $.50 per hour, the respective prevailing rates for said wage classifications were $1.25 per hour and $.625 per hour. When Plaintiff's protest and demand for an adjustment of compensation were rejected by the Contracting Officer, and said rejection was affirmed by the Chief of Engineers, Plaintiff, upon completion of the Contract, asserted a claim for damages for said misrepresentation, in the sum of $15,597.38.

Also, during the progress of the work, Plaintiff was required to perform a large amount of trench excavation in close proximity to six privately owned structures immediately adjacent to the Contract site, and with respect to which it was repeatedly provided throughout the Contract specifications, that Plaintiff was chargeable for any and all damage caused to said structures during the life of the Contract. The Contract plans specified those locations on the Contract where sheeting and shoring must be installed for the protection of said structures and to furnish lateral support to the ground upon which same were located. The Contract specifications gave broad powers to the Contracting Officer to determine the adequacy of said protection, and to demand installation of Sheeting and Shoring at such other Contract locations where the use of same seemed necessary or advisable. The sheeting and shoring so installed was to be paid for at the rate of $.65 per square foot of area protected thereby.

Because of its continuing liability for the said six (6) adjacent structures until the completion of the Contract, Plaintiff raised no objection to the small sums allowed on account of this item of the work in the monthly partial esti-

mates, but upon the issuance of the final estimate, after completion of the work, and when all responsibility for said structures was ended, protested the inadequate allowance by the Contracting Officer for the Sheeting and Shoring installed, and demanded to be advised how the Contracting Officer had arrived at the total quantities allowed Plaintiff under said contract item.

The Contracting Officer failed and refused to reveal the computations by which he arrived at the total amount of 3,413.9 square feet allowed Petitioner, for the aggregate of the areas protected by the Sheeting and Shoring installed to safeguard the aforesaid (6) structures, and same have never been introduced into the record in this action to justify said allowance. Said Contracting Officer, without producing any figures in support thereof, asserted that he had employed a method of measurement that excluded any allowance to Plaintiff for Sheeting and Shoring installed in excavated areas below the bottom level of the adjacent structures, and therefore, and if, in fact, said formula was used, he has denied Plaintiff any compensation whatsoever for the Sheeting and Shoring that supplied the lateral support necessary to prevent disturbance of the ground upon which said adjacent structures rested. Accordingly, plaintiff has asserted a claim for that portion of the Sheeting and Shoring so excluded, amounting to $13,904.21.

The subject Contract called for the construction of an extended flood control wall, and construction of same was commenced on August 20, 1941.

Despite the fact that concreting operations were conducted under the strict supervision and direction of the Contracting Officer, and experimental changes in methods of operation were made from day to day, the sections of the concrete wall poured during the succeeding two months, continued to show unsatisfactory surfaces, until October 22,

1941, a few days prior to the shutdown of concreting operations for the winter, when the enrichment of the concrete design by increasing the percentage of cement therein, ordered by the Contracting Officer, finally produced concrete with satisfactory surfaces.

However, although said change of design meant an increase in cost to Defendant for the additional cement used, of only $.15 per cubic yard of concrete placed, the Contracting Officer nevertheless refused to continue to use said enriched mixture, but after two to three days of operations, and the close down for the winter, directed that when operations were resumed in the Spring of 1942, the original concrete design would be used, and the desired surfaces would be obtained by a more thoroughgoing treatment of the exposed surfaces, than was called for in the original Contract specifications.

On October 29, 1941 he issued detailed specifications for said surface treatment, to be used in finishing the surfaces of the concrete that would be erected in 1942.

Said new specifications drastically changed the original Contract specifications for the finishing of exposed concrete, and added two operations and three materials not previously required.

Said surface treatment, although eliminating the additional cost to Defendant of $.15 per cubic yard of concrete placed, that Defendant would have had to pay to obtain satisfactory surfaces by using the enriched concrete design referred to above, increased Plaintiff's cost in 1942 by more than $2.18 per cubic yard of concrete placed, and when the Contracting Officer refused to allow to Plaintiff its aggregate increased costs of $6,070.19 for finishing concrete placed in 1942, in accordance with said new specifications, said claim was added to the other items of damage asserted in this action.

Reasons for Granting the Writ

The instant case is noteworthy for the following questionable acts and practices that may establish dangerous precedents unless reviewed by this Honorable Court, to wit:

1. Defendant's Contracting Officer obtained on January 31, 1941, the Schedule of Minimum Wages incorporated in the subject Contract, that was not approved and accepted until June 3, 1941,—more than four (4) months later,—without endeavoring in the interim to bring said Wage Schedule up to date.

2. Said Wage Determination not only failed to comply with the requirements of the Davis-Bacon Act, because it was predicated upon an alleged investigation by the War Department District Engineer, rather than by the Secretary of Labor—but also, did not comply in any respect with the provisions of the Labor Department's Regulation #503, directing the manner in which such investigations were to be made.

3. The refusal of the Contracting Officer to produce for Plaintiff, or upon the trial, the computations resulting in the total quantity allowed Plaintiff under Contract Item #7, for Sheeting and Shoring installed, was arbitrary, unreasonable and a contemptuous rejection of the obligation of every public official to explain and justify his acts and decisions, and also a breach of his implied obligation to prove the quantities allowed by him on a "unit-price contract".

4. With respect to the "finishing" of exposed concrete surfaces,—the original Contract specifications prohibit *"the plastering over"* of said surfaces. The new and revised specifications issued after the Contract had been in progress five (5) months, include the direction that *"a thin sand-cement mortar shall be applied to the entire surface with a steel trowel.* We respectfully submit that such reversal of directions can only be regarded as a change in specifications, for which Plain-

tiff must be compensated pursuant to the provisions of Article 3 of the Contract.

5. A continued disregard by the Courts of such arbitrary contract violations as those enumerated above, must eventually result in the inability of Government agencies to obtain fair and reasonable bids for the construction of necessary public improvements.

Conclusion

WHEREFORE, plaintiff prays that a Writ of Certiorari be granted by this Court, directed to The Court of Claims of The United States, in order that this Court may review the questions presented herein.

Respectfully submitted,

JEROME BEAUDRIAS,
Counsel for Petitioner.

MALCOLM A. MACINTYRE,
Of Counsel.

(8967)

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

Having already filed its petition for certiorari in *United States* v. *Binghamton Construction Co., Inc.*, October Term, 1953, No. 65, the Government, in the event that petition is granted, does not oppose the granting of a writ of certiorari on the cross-petition in No. 78, limited to the issues as to alleged wage representations arising from the standard building contract provision for minimum wages required to be included by the Davis-Bacon Act.

1. The Government believes that any judgment in favor of cross-petitioner was erroneous, for the

reasons set forth in its petition in No. 65, and that the contentions of cross-petitioner proceed on faulty premises and are without merit.[1] However, it does not oppose review of the issues as to alleged wage representations presented in No. 78, so that a full review may be had of the effects of the minimum wage schedule of the Secretary of Labor. The court below held that it constituted a warranty that the contractor would be able to obtain workers at the minimum rates prescribed by the Secretary and was not solely to protect workers against substandard wages. The importance of this question in Government construction contracts has been shown in our petition in No. 65.

2. The other questions presented by the cross-petition in No. 78 are unrelated to the wage claims, peculiar to the contract in question, and of no general importance.

A. The cross-petitioner seeks payment for sheeting and shoring not furnished. Interpreting the specification that sheeting and shoring "be measured by the square foot of protected area" (R. 11),

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[1] Petitioner claims that the contract was "void *ab initio*" because the Government did not properly determine the schedule of minimum wages under the Davis-Bacon Act. But the Davis-Bacon Act does not specify how wage rates should be determined. There was full compliance with the Labor Department's regulations, which did not confine the Department to its own files nor deny it the assistance of other agencies of the Government and access to their sources of information. In any event, how cross-petitioner would benefit if the contract were void *ab initio* by reason of an improper determination of minimum wages (Pet. in No. 78, p. 2) is left wholly to conjecture.

it claims that the total ground area occupied by buildings or other supported structures ought to be included rather than the face of the disturbed area against which the sheeting and shoring was placed for protection. In fact, cross-petitioner accepted payments computed on the latter basis during the progress of the work (R. 48-49, 69). The formula applied was reasonable and calculated to carry out the purpose of this provision of the contract. As the court below said, " * * * the purpose of this sheeting and shoring was to replace the natural support removed in the course of excavation. The ground area of a structure from which a portion of the natural support has been removed does not appear to have any reasonable relationship either to the amount or to the cost of providing the substitute support. Rather, the 'protected area' is the area of the surface laid bare by excavation such as the foundation wall of a building next to which sheeting is placed. Defendant computed it on this basis" (R. 70).

B. The court below, which was in an advantageous position to determine what the contract required by way of a suitable surface finish (R. 11), specifically found that "No more was required of plaintiff than was justified by the specifications" (R. 72). There is no occasion to review this determination which is special to this particular contract and case.

For the foregoing reasons, the United States does not oppose the granting of the petition for a writ of certiorari limited to the issues as to alleged representations concerning wages, but does oppose the granting of the writ on the other issues.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER 1953.

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION COMPANY, INCORPORATED, a Corporation,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On March 15, 1954, this Honorable Court denied Petitioner's Petition for a Writ of Certiorari.

Petitioner respectfully prays for a rehearing in accordance with the provisions of Rule 33 of the Rules of this Court, upon the questions and for the reasons hereinafter set forth:—

I.

Article 3 of the Government's Standard Form of Construction Contract[1]—and Paragraph 1-19 of the Related Standard Specifications[2] have been nullified by the decision of the Court below.

Read together, said portions of the Contract and Specifications prohibit the Contracting Officer from increasing the contractor's cost of performance by *making any changes in the Specifications of the work to be performed, or in the manner of its execution,* without granting contractor an equitable adjustment in compensation.

In the instant case, *it is undisputed,* that on October 29, 1941, five (5) months after work had been commenced, the Contracting Officer issued *amended specifications* as to the manner in which the exposed surfaces of concrete walls *to be erected in 1942,* must be "finished". Said amended specifications,[3] by substantially changing and enlarging the method of treatment and adding three (3) materials not

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1. In its pertinent portions, said Contract Article provides as follows,—

> "Article 3. *Changes.*—The contracting officer may at any time, by a written order, * * * make changes in the drawings and/or specifications of this contract and within the general scope thereof. *If such changes cause an increase * * * in the amount due under this contract * * * an equitable adjustment shall be made * * *.*" (Emphasis added.)

2. In its pertinent portions, Paragraph 1-19 of the Contract Specifications, provides as follows,—

> "1-19. *Minor Modifications.*—The right is reserved to make such minor changes in the execution of the work to be done under these Specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract, *provided that the unit cost to the contractor of doing the work shall not be increased thereby.* * * *" (Emphasis added.)

3. R. 56 to 58 inc.—see "Method of Treating New Concrete Work".

previously specified, *increased the Petitioner's cost of performing this work in the admitted sum of $6,070.19.*[4]

However, the Court below, in denying Petitioner's claim for said added cost, referred to said *new specifications* as "corrective measures",[5] and found same to be merely a necessary supplement to the original Contract Specifications,[6] despite the fact that said *new specifications* so changed the "finishing" process as to direct a coating of the entire surface of the exposed concrete,[7] whereas the original specifications specifically prohibited the use of any such coating.[8]

We respectfully submit, that while the *new specifications* entitled "Method of Treating Existing Work",[9] issued on October 29, 1941, for use with respect to the 13% of the concrete walls already erected, might properly be called "corrective measures",—the *entirely different set of new specifications* entitled "Method of Treating New Concrete Work",[10] issued for use with respect to the 87% of the concrete walls to be erected in 1942, that caused Petitioner's loss of $6,070.19, may not properly be described as necessary "corrective measures".

By the testimony of the Government's witnesses and the entries in the daily "Log" or diary kept for the subject

---

4. R. 63.—Special Finding 47, wherein the decision of the Chief of Engineers denying said claim for Concrete Finishing is quoted as follows,—

> "* * * In regard to the item of $6,220.32 (amended on trial to $6,070.19) for finishing concrete erected in 1942, *the only question involved* is whether instructions issued by the Contracting Officer for said work exceed the requirements of the contract * * *". (Emphasis added.)

5. R. 71—next to last paragraph of said page.

6. R. 72—2nd paragraph of said page.

7. R. 57—mid-page.

8. R. 72—mid-page. See quotation from Par. 7-05 of Specs.

9. R. 56.

10. R. 56.

Contract by the Contracting Officer's field representatives, it was fully admitted that the *new specifications* issued October 29, 1941, resulted from experiments conducted by the Government's engineers on the subject Contract, between September 24th and October 22nd, 1941.[11]

How then, in bidding for the subject Contract in April of 1941, could Petitioner anticipate being required to perform its "Concrete Finishing" operations in accordance with the *new specifications* issued on October 29, 1941, *when the Contracting Officer was himself unaware of said specifications until after October 22, 1941,* the end of the aforesaid period of experimentation?

We respectfully submit that if the decision of the Court below, sustaining the Contracting Officer in such flagrant disregard of the provisions of Article 3 of the Contract and Paragraph 1-19 of the Specifications, is to go unchallenged, said Contract provisons are a nullity and should be eliminated from the Government's Standard Form of Construction Contract, as being wholly misleading to prospective bidders.

II.

In denying petitioner's claim for sheeting and shoring installed to protect adjacent structures,—the Court below has resolved a Contract ambiguity in a manner violating rules long propounded and upheld by this Honorable Court.

The Contract provides that Sheeting and Shoring was to be installed for two purposes, i.e., (1) for the protection of the work being performed, and (2) for the protection of adjoining property.[12]

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11. Deft's Ex. B-A (Contract Log), entries of September 25 and October 11, 13, 20 and 22 of 1941. Also see Pltf's Exceptions to Report of Commissioner, pages 83-90 inc.

12. R. 47—See Par. 3-06(a) of Specifications as quoted.

It further provides that the Sheeting and Shoring installed *"will be measured by the square foot of protected area"*,[13] for which Petitioner was to receive the unit price of 65¢.

The question to be determined was the meaning of the term "protected area" as used in the Specifications.[14]

The confusion of the Contracting Officer as to what was intended by said term, is clearly shown by the fact that on three different occasions during the progress of this controversy, he and his superior, the Chief of Engineers, have asserted *three (3) different and conflicting methods of computation allegedly used in computing the inadequate sum allowed Petitioner for this work*[15]—none of which could possibly have been used to arrive at the quantities allowed Petitioner.

The Contracting Officer failed and refused, either before or during the trial of this action, to produce any computations proving that any one of said three (3) different and conflicting methods of computation had ever actually been used.

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13. R. 48—See subd. (c) of Par. 3-06 of Specifications, as quoted.

14. R. 70—3rd par.

15. (1) In letter to Petitioner of February 1, 1943, the Contracting Officer asserted his allowance for Sheeting and shoring was *"based on field measurements of length and heighth of sheeting placed"* (R. 49—mid-page).

(2) In findings submitted to the Chief of Engineers, in opposition to Petitioner's appeal of March 19, 1943, the Contracting Officer asserted that the quantities allowed Petitioner had been ascertained *by multiplying the length of the trench sheeted by "the difference in elevation between the top elevation of the sheeting placed and the bottom elevation of the adjacent structure under construction"* (presumably meaning a structure being erected by Petitioner under the Contract) (see Pltf's Ex. 3 [33-41]).

(3) In his decision of July 31, 1944 rejecting Petitioner's appeal, the Chief of Engineers asserted that for *Sheeting and Shoring installed for the protection of adjacent structures*, the quantities allowed Petitioner had been computed *by multiplying the length of trench sheeted by "the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures"*.

We therefore respectfully submit that in arbitrarily selecting and approving the Contracting Officer's alleged use of one of said three (3) conflicting methods, the Court below did not resolve this dispute nor construe the Contract ambiguity most strictly against the draftsman, that this Honorable Court has heretofore decreed in numerous cases, as the rule to be followed.

While the Court below has held that the decision of the Contracting Officer upon this question as to what constituted the "protected area" was not final under the rule most recently upheld in *Wunderlich* v. *U. S.*, 342 U. S. 98, said Court has sustained the Contracting Officer in his allowance to Petitioner for said Contract item, despite said Contracting Officer's conflicting assertions as to the method of computation that he used, and his refusal to produce the actual dimensions of length and height allegedly used in arriving at the quantities allowed.

This is the very type of perverse, captions, and incompetent conduct on the part of a public official mentioned by Mr. Justice Douglas, Mr. Justice Reed and Mr. Justice Jackson in the dissenting opinions read in the above entitled action.

CONCLUSION.

For the above reasons, it is respectfully urged that a rehearing be granted, in order that complete justice be effected.

Respectfully submitted,

JEROME BEAUDRIAS,
Counsel for Petitioner,
83-85 Warburton Ave.,
Yonkers 2, New York.

The undersigned counsel for Petitioner certifies that the within petition for rehearing is filed in good faith, not for delay, and is, as counsel believes, restricted to the grounds specified by Rule 33, as amended, Supreme Court Rules.

JEROME BEAUDRIAS,
Counsel for Petitioner.

March, 1954.